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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 1069

No. 174

ALBERT R. COSGROVE,
Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois.

## RECORD OF CIRCUIT, APPELLATE AND SUPREME COURTS OF ILLINOIS.

ZENO MIDDLETON,
1718 State Street,
East St. Louis, Illinois,
Attorney for Petitioner.

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56-M-14.

IN THE

# Appellate Court of Illinois,

FOURTH DISTRICT.

MAY TERM, A. D. 1956.

ALBERT R. COSGROVE,
Plaintiff-Appellant,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Defendant-Appellee.

Appeal from the Circuit Court of Madison County, Illinois.

The Honorable Quinten Spivey, Judge Presiding.

## ABSTRACT OF RECORD.


Record Page

1 Convening Order.

2–4 Complaint.

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12 Defendant's Motion to Dismiss Complaint or in the alternative to make more definite and certain.

13 Docket order of September 24, 1953, granting plaintiff leave to file amended complaint and same filed; defendant ruled upon to answer in 20 days.

15–22 **AMENDED COMPLAINT.**

Albert R. Cosgrove, plaintiff, with leave of Court first had and obtained, amends his complaint and alleges:

1. That the plaintiff is a resident of St. Clair County, Illinois; that the defendant, The New York, Chicago and St. Louis Railroad Company, is a railroad corporation operating as a common carrier in interstate commerce within the meaning of Section 151, Title 45, U. S. Code (being the Railway Labor Act of 1926), as amended; and that the defendant is incorporated under and by virtue of the laws of the State of Illinois as well as under the laws of other states and is thereby a multi-state corporation.

2. That in the year 1923 at Madison County, Illinois, plaintiff entered into a contract of employment with the defendant as a machinist's helper, at which position he was employed until March, 1929.

3. That on March 8, 1929, at Madison County, Illinois, plaintiff entered into another contract of employment with the defendant, wherein plaintiff agreed to work for defendant as a car inspector and defendant

agreed to employ plaintiff according to the rates of pay and regulations of what is known as the "Carmen's Agreement."

4. At the time of the occurrence of the matter herein complained of there was in full force and effect a contract existing between defendant and the plaintiff (executed by his bargaining agent, Brotherhood of Railway Carmen of America), the parts of which pertinent hereto provided as follows:

> Rule 14. In reduction of forces or when new jobs are created or vacancies occur in the respective crafts, the oldest employee in point of service shall, if sufficient ability is shown by trial, be given preference in filling such new jobs or any vacancies that may be desirable to them. All vacancies or new jobs created will be bulletined. Bulletins must be posted five days before vacancies are filled permanently. Employees desiring to avail themselves of this rule will make written application to the official in charge, and a copy of the application will be given to the Local Chairman.
>
> An employee exercising his seniority rights under this rule will do so without expense to the carrier; he will lose his right to the job he left; and if after a fair trial he fails to qualify for the new position, he will have to take whatever position may be open in his craft.
>
> Temporary vacancy of 30 days or more will be bulletined. Employees filling such temporary vacancies will be returned to their former positions at the expiration of the temporary position.

Rule 22. When it becomes necessary to reduce expenses at any point or in any department or subdivision thereof, the hours or forces may be reduced by mutual agreement. Seniority as per Rule 26 to govern. The men affected to take the rate of the job to which they are assigned in accordance with the provisions of Rule 14. In reducing forces the ratio of apprentices will be maintained.

Three working days' notice will be given men affected before reduction is made and lists be given local committee.

In the reduction of forces employees who so desire may have their seniority rights in favor of a junior employee, seniority to govern, at that point. Such waiver shall be in writing, and a copy furnished the local committee.

In the restoration of forces senior laid off men, including those who have waived their rights as per the preceding paragraph, will be given preference in returning to service, if available within seven (7) days. Local committee will be furnished list of men to be restored to service.

Rule 24. When reducing forces, if men are needed at any other point they will be given preference to transfer with privilege of returning to home station when force is increased, such transfer to be made without expense to the Company. Seniority and ability to govern in all cases.

Rule 26. Seniority of employees in each craft covered by this agreement shall be confined to the

point employed in the Maintenance of Equipment Department.

Four sub-divisions of the Carmen as follows:

Pattern Makers.
Upholsterers.
Painters.
Other Carmen.

The Seniority lists will be open to inspection and copy furnished the committee.

In the event that work is moved from any point, the employees affected at the point the work is moved from will have the privilege of exercising their seniority rights at the point employed to any job that may be preferable to them in their craft according to their seniority.

Men promoted to Supervisory capacity (both monthly and hourly rated positions), will hold and accumulate seniority in their respective crafts at the point last employed as craftsmen and may exercise such seniority if displaced either account of position being abolished or for no reasons of his own; if such positions be vacated for reasons of his own, he will then take the position of junior employee of his craft and after which he can exercise his seniority to fill any vacancy or new position.

Rule 29. Should an employee be assigned temporarily to fill the place of a foreman, he will be paid his own rate, straight-time for straight-time hours and overtime for overtime hours, if greater than the foreman's rate. If it is not, he will get the foreman's rate. In filling such posi-

tions, preference shall be given to mechanics in the respective crafts.

Rule 30. (Effective October 1, 1943.)

Should any employee subject to this agreement believe he has been unjustly dealt with, or any of the provisions of this agreement have been violated, he shall have the right to take the matter up with his foreman in person or through the duly authorized local committee within 10 days. If unable to arrive at a satisfactory settlement with the foreman, the case may be taken to the highest local officials in the regular order preferably in writing. If stenographic report of investigation is taken the committee shall be furnished a copy. If the result still be unsatisfactory, the employee, or the duly authorized general committee, shall have the right of appeal, preferably in writing, with the highest officials designated to handle such matters, in their respective order, and conference will be granted within ten days of application.

Should the highest designated railroad official, or his duly authorized representative, and the duly authorized representative of the employees fail to agree, the case may then be handled in accordance with the Railway Labor Act.

All conferences between the local officials and local committees to be held during regular working hours without loss of time to committeemen. Prior to assertion of grievances as herein provided, and while questions are pending there will neither be a shutdown by the employer nor a suspension of work by the employee.

Rule 31. An employee shall not be discharged for any cause without first being given an investigation.

If it is found that an employee has been unjustly discharged or dealt with, such employee shall be reinstated, and shall be compensated for the wage loss, if any, suffered by him, the compensation earned by him in outside employment in the meantime shall be taken into consideration in determining the wage loss.

Rule 33. Helper apprentices shall retain their seniority as Helper until they have completed the first year of their apprenticeship.

Rule 42. Craftsmen and apprentices will be furnished sufficient competent help, when needed to handle the work, if available. When experienced Helpers are available, they will be employed in preference to inexperienced men. On work which requires a Helper continuously, a regular Helper will be assigned as far as practicable.

Laborers when used as Helpers one hour or more will be paid the Helper's rate while so employed.

Rule 48. Helpers shall not be advanced to the detriment of mechanics or apprentices, except as provided for in the apprentice rules where the advancement of Helpers to apprenticeship in the respective trades is contemplated in this agreement.

Rule 49.

Effective December 27, 1943, the minimum rates of pay will be as follows:

| Class of Employees | Minimum Rate Per Hour |
|---|---|
| Machinists | $1.04 |
| Boilermakers | 1.04 |
| Blacksmiths | 1.04 |
| Sheet Metal Workers | 1.04 |
| Electrical Workers covered by Rule 106 | 1.04 |
| Electrical Workers covered by Rule 107 | 1.00 |
| Carmen (Passenger Car Work, including Upholsterers, Pattern Makers, Cabinet Makers and Locomotive and Passenger Car Painters) | 1.04 |
| Carmen (Freight Car Work, including Freight Car Painters and Locomotive Tender Truckmen) | .97 |
| Car Inspectors (Freight and Passenger) | .97 |
| Wrecking Derrick Engineers and Locomotive Crane Operators | .97 |
| Helpers—All Crafts: | |
| 1st year minimum 290 days | .78 |
| Over one year | .81 |
| Coach cleaners and preparers | .66 |

Effective as of October 1, 1943, employees will be allowed one cent for each hour actually worked, for checking in and out and making out service cards. The practice of employees checking in and out on their own time will be continued.

## Carmens' Special Rules.

Rule 115. Any man who has served an apprenticeship or who has had four (4) years' practical experience at carmen's work, and who with the aid of tools, with or without drawings, can lay out, build or perform the work of his craft or occupation in a mechanical manner, shall constitute a Carman.

Rule 116. Carmen's work shall consist of * * *; inspection work and repairs in connection with air brake equipment on freight cars; * * * joint car inspectors, car inspectors, safety appliance and train car repairs; * * * and all other work generally recognized as carmen's work.

Rule 118. Car Inspectors including joint car inspectors, where Yard Masters or Clerks are not employed, may when necessary to expedite transportation, take seal records, commodity records and destination of cars.

## Carmen Helpers' Special Rules.

Rule 121. Carmen Helpers' work shall consist of any work he is instructed to perform under the direction of the mechanics or apprentices he is working with, employees engaged in washing and scrubbing the inside and outside of passenger coaches preparatory to painting; removing of paint on other than passenger cars preparatory to painting, car oilers and packers; stock keepers (car department), operators of bolt threaders, nut tappers, drill presses and punch and shear operators (cutting only bar stock and scrap), holding

on rivets, striking chisel bars, side sets, and backing out punches; using backing hammer and sledges in assisting carmen in straightening metal parts of cars; rebrassing of cars in connection with oilers' duties, cleaning journals; repairing steam and air hose; assisting carmen in erecting scaffolds, grinding angle cocks, sand blasting, making grain and coal doors, assisting in dismantling cars for repairs, and all other work generally recognized as carmen helpers' work, shall be classed as Helpers.

Rule 134. Fifty per cent of the apprentices may be selected from carmen's helpers who have had not less than two consecutive years' experience at the point employed at the time application for apprenticeship is made, except that when the necessary number of regular apprentices cannot be obtained, the quota may be filled by helper apprentices, this to be handled in conjunction with the Shop Committee. Helper apprentices shall not be over 30 years of age.

and, that at the time he was employed as an inspector he was informed that the "Carmen's Agreement" was his contract of employment with defendant.

5. Plaintiff worked for defendant performing car inspector's work from and after March 8, 1929, at Madison County, Illinois, on and off throughout the great depression, and on September 15, 1943, he was made a car inspector leader.

6. Defendant issued and delivered to the plaintiff:

(1) An identification Card No. 14, authorizing him as a Car Inspector to operate a motor car dated Jan-

uary 17, 1930, until January 1, 1931, a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 1.

(2) An employee's identification card, showing his name and occupation and assigning him identification No. 9883, with instructions thereon that said identification number should be shown on all time and service reports, deductions, orders, etc., a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 2.

(3) An identification card No. 4501, issued January 20, 1943, giving his physical description and right thumb print for identification purposes during World War II, a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 3.

(4) A system pass No. S-941, good for the year 1945-1946 until December 31, 1946, a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 4.

(5) A system pass No. S-4738, good for the year 1947-1948, until December 31, 1948, a copy of which is attached hereto and made a part hereof and marked Plaintiff's Exhibit No. 5.

7. Plaintiff, until the date of his discharge, performed his duties and complied with all the provisions and regulations of the defendant.

8. Plaintiff complied with the Carmen's Agreement in requesting an investigation and hearing and has repeated said request through regular channels up to and including the Chief Operating Officer of defendant, but the defendant has failed, refused and neg-

lected to make an investigation, conduct a hearing, present witnesses against the plaintiff or allow plaintiff to be heard and present his witnesses or evidence in his behalf, or to have a transcript of hearing and testimony.

9. Plaintiff's relationship as a car inspector was severed by defendant on June 13, 1949, without formal charge or hearing, and he was never since allowed by defendant to work at his employment since said time.

10. That on the 13th of June, 1949, at approximately 2:30 o'clock in the afternoon, or thirty minutes before he was due to go to work on his job in the Madison Yards of the defendant, that his foreman, Mr. H. C. Summers, stated to the plaintiff that he had been talking with Mr. Rudy Killian, District Car Foreman, whose office was at Frankfort, Indiana, and that Mr. Killian had given instructions that the plaintiff was to be sent home unless he signed a statement signing away his rights as a carman and consenting to be placed on the seniority roster at said Yards of the defendant as a car repair helper.

11. Plaintiff's discharge was not the result of any act of his, but rather from the violation of the contract of employment by defendant and that as a result thereof plaintiff has been damaged in the following particulars:

(a) Loss of seniority rights.

(b) Loss of his means of livelihood.

(c) Loss of Pension rights.

(d) Loss of Insurance benefits.

(e) Loss of disability benefits.

(f) Loss of vacation rights.

(g) Loss of hospital rights.

(h) Loss of pass rights.

12. Plaintiff was born March 1, 1898, and is now 55 years of age and that the foregoing rights were earned as the results of over 24 years of car inspecting service to the defendant, and that he is now at the age where he is, because of his age, unable to obtain work as a car inspector, and because thereof he is unable to ever accumulate such emoluments as he had acquired with the defendant, all to his damage in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars.

Wherefore, plaintiff prays judgment against the defendant in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, together with costs.

Albert R. Cosgrove, Plaintiff,

By Zeno Middleton,
His Attorney,
1360a State Street,
East St. Louis, Illinois,
Upton 5-2550.

Plaintiff Demands Jury Trial and Requests Summons Be Issued.

22 Exhibits 1, 2, 3, 4 and 5.

## ANSWER TO AMENDED COMPLAINT.

25-26 Comes Now The New York, Chicago and St. Louis Railroad Company, a corporation, defendant in the above captioned cause, by its attorneys, Pope and Driemeyer, and for answer to plaintiff's amended complaint states:

1. Defendant admits the allegations of paragraph 1 of said complaint.

2. Defendant denies the allegations of paragraph 2 of said complaint.

3. Defendant denies the allegations of paragraph 3 of said complaint.

4. Defendant admits the existence of a certain contract between it and the Brotherhood of Railway Carmen of America, as set forth in paragraph 4 of plaintiff's complaint, but denies all of the other allegations therein contained.

5. Defendant denies the allegations of paragraph 5 of said complaint.

6. Defendant denies the allegations of paragraph 6 of said complaint, and denies the allegations of subparagraphs (1), (2), (3), (4) and (5) thereunder.

7. Defendant denies the allegations of paragraph 7 of said complaint.

8. Defendant denies the allegations of paragraph 8 of said complaint.

9. Defendant denies the allegations of paragraph 9 of said complaint.

10. Defendant denies the allegations of paragraph 10 of said complaint.

11. Defendant denies the allegations of paragraph 11 of said complaint.

12. Defendant denies the allegations of paragraph 12 of said complaint.

Pope and Driemeyer,

By /s/ Frank M. Rain,

Frank M. Rain,

Attorneys for Defendant.

Pope and Driemeyer,
322 First National Bank Building,
East St. Louis, Illinois.

29 Defendant's Motion for leave to withdraw Answer to Amended Complaint.

37-38 **MOTION TO DISMISS FOR LACK OF JURISDICTION.**

Comes Now The New York, Chicago and St. Louis Railroad Company, a corporation, defendant in the above captioned cause, by its attorneys, Pope and Driemeyer, and moves the Court to dismiss this cause, for the reason that the Court has no jurisdiction of the subject matter set forth in plaintiff's complaint.

In support of its motion, defendant states:

1. Plaintiff's complaint shows on its face that plaintiff failed, neglected or refused to exhaust administrative remedies available to him prior to commencing this action.

2. Plaintiff failed to avail himself of the administrative remedies set out in Rule 30 of the contract pleaded in his complaint, in that:

(a) He suspended work and walked off the job on the 13th day of June, 1949.

(b) He made no effort to follow the procedures set forth in Rule 30, but he did progress his alleged grievance directly to the National Railroad Adjustment Board.

(c) Plaintiff, even though advised by the National Railroad Adjustment Board, by letter dated June 12, 1950, that his ex parte submission "does not disclose that the subject matter has been handled in the 'usual manner' and failed of adjustment in said manner, as required by Section 3 (1) of the Railway Labor Act and our Rules (Circular No. 1);" nevertheless, failed, neglected or refused to process or progress his alleged grievance as required by the contract herein pleaded and the Rules of the National Railway Adjustment Board. A copy of the aforesaid letter, marked Defendant's Exhibit "A", is attached hereto and made a part hereof.

(d) Plaintiff was neither discharged nor disciplined, therefore he was obliged to process his grievance strictly in accordance with the provisions of Rule 30 of the contract set forth in his complaint.

Wherefore, defendant prays that this cause be dismissed, and that it go hence without day and recover its costs herein expended.

Pope and Driemeyer,
By Frank M. Rain.

(Verification.)

39 **PLAINTIFF'S EXHIBIT "A"**

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION
Twenty-First Floor, Consumers Bldg.
220 South State Street, Chicago 4, Illinois

June 12, 1950.

Mr. A. R. Cosgrove,
510 N. 38th Street,
East St. Louis, Illinois.

Dear Sir:

This has reference to your ex parte petition dated October 15, 1949.

I am directed to advise you that the Division finds that since the ex parte submission does not disclose that the subject matter has been handled in the "usual manner" and failed of adjustment in said manner, as required by Section 3 (1) of the Railway Labor Act and our Rules (Circular No. 1), it appears that the Board is without jurisdiction.

There is in effect an agreement between the New York, Chicago and St. Louis Railroad Company and System Federation No. 57, A. F. of L., in which rules are set forth defining the usual manner for progressing grievances. There is nothing in the ex parte submission submitted by you to indicate that the alleged grievance has been handled and appealed in the manner set forth in the agreement.

Very truly yours,
National Railroad Adjustment Board,
By Order of Second Division,
S/ J. L. Mindling, Secretary.

cc: Mr. T. C. Shortt.

39-42 Plaintiff's Motion to Strike.

43-44 Plaintiff's Motion to inspect, copy, impound and preserve evidence.

46 Docket Entry of December 7, 1954, showing Motion to Dismiss was submitted on memorandum and taken under advisement.

47-56 Convening and continuation orders.

57 Docket Entry of December 21, 1955, dismissing Complaint with prejudice to plaintiff on Motion of defendant as per written order on file.

58 **JUDGMENT.**

This matter came on to be heard on defendant's verified "Motion to Dismiss for Lack of Jurisdiction," and Exhibit "A" thereto attached, on the 7th day of December, 1954, same having been submitted on defendant's memorandum brief, plaintiff's answer thereto dated December 8, 1954, and defendant's reply dated December 9, 1954.

The Court now having examined the briefs of the parties, the pleadings herein filed, and all matters pertinent thereto, finds that it has no jurisdiction of the subject matter set forth in plaintiff's amended complaint, and that said complaint should be dismissed.

Wherefore, It Is Ordered, Adjudged and Decreed that defendant's motion to dismiss plaintiff's amended complaint for lack of jurisdiction of the subject matter be and the same hereby is sustained and allowed, and said suit be and the same hereby is dismissed with

prejudice. Judgment is therefore entered in favor of defendant and against plaintiff, in bar of his action, and defendant shall go hence without day and recover his costs herein expended.

/s/ Quinten Spivey,
Quinten Spivey,
Circuit Judge.

Filed Dec. 21, 1955.

62 Docket Entry that Notice of Appeal was filed January 11, 1956.

64-65 Notice of Appeal and Proof of Service.

66 Docket Entry that Praecipe for Record was filed January 14, 1956.

68 Praecipe for Record and Proof of Service.

70 Order entered February 29, 1956, extending time for filing record on appeal 30 days.

71 Approval of Record by Opposing Counsel.

Approval of Record by Presiding Judge.

Certificate of Clerk of Circuit Court of Madison County, Illinois, and file mark of said Clerk showing the record was filed in said Court on March 28, 1956.

ZENO MIDDLETON,
1360a State Street,
East St. Louis, Illinois,
Attorney for Plaintiff-Appellant.

IN THE

# Supreme Court of Illinois.

MARCH TERM, 1957.

ALBERT R. COSGROVE,
Plaintiff-Appellant,
vs.
THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Defendant-Appellee.

Petition for Leave to Appeal to the Supreme Court From the Appellate Court for the Fourth District.

Hon. Quinten Spivey, Judge Presiding.

## ABSTRACT OF RECORD OF APPELLATE COURT.


Record Page

1 Placita.

3 April 5, 1956. Record on Appeal filed in Appellate Court with the Appellee's counsels' approval thereon.

5 April 10, 1956. Notice of filing record on appeal with proof of service filed.

7 April 30, 1956. Appellee's motion to dismiss appeal filed.

11 May 1, 1956. Objections of plaintiff to the motion to dismiss the appeal filed.

14 May 3, 1956. Nine copies of plaintiff's brief and the abstract of the record filed, with proof of service.

16 May 8, 1956. Appellee's motion to dismiss the appeal denied.

18 May 25, 1956. Appellee's brief filed in Appellate Court.

20 June 1, 1956. Nine copies of plaintiff's reply brief filed with proof of service.

23 June 5, 1956. Record of plaintiff furnishing Appellate Court with decision rendered by United States Supreme Court on May 21, 1956.

25 Oct. 23, 1956. Case taken under advisement after hearing oral arguments.

27 Nov. 5, 1956. Opinion of the Appellate Court filed.

28 Opinion of the Appellate Court.

32 Nov. 28, 1956. Plaintiff's motion for certificate that there is fairly involved in plaintiff's claim more than $1,500.00.

34 Dec. 3, 1956. Certificate that more than $1,500.00 is involved in plaintiff's claim, issued and filed.

36 Dec. 29, 1956. Praecipe for Appellate Court record filed.

37 Certificate of the Clerk of the Appellate Court that the foregoing is a true, perfect and complete transcript of the record in the Appellate Court, signed, dated and sealed with the Seal of the Appellate Court.

ZENO MIDDLETON,
Attorney for Petitioner, Albert R. Cosgrove, Plaintiff-Appellant.

IN THE

# Supreme Court of Illinois.

MARCH TERM, 1957.

| | |
|---|---|
| ALBERT R. COSGROVE,<br>Plaintiff-Appellant,<br>vs.<br>THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,<br>Defendant-Appellee. | Petition for Leave to Appeal to the Supreme Court From the Appellate Court for the Fourth District. |

Hon. Quinten Spivey, Judge Presiding.

## APPELLANT'S PETITION FOR LEAVE TO APPEAL.

### OPINION.

In the
Appellate Court of Illinois,
Fourth District,
Oct. Term, 1956.

Appeal From the Circuit Court of Madison County, Illinois, Per Curiam.

The defendant here filed a motion to dismiss this appeal for failure of appellant to comply with the

rules of court. Prior to filing the briefs this motion was presented to a judge of this court in vacation who relied upon the representations of appellant's counsel set forth in his objections, and thereupon denied the motion.

Upon final hearing in this court, the actual procedure that was followed has been shown to this court from the official records. It is shown therein that the trial court dismissed the complaint on motion and entered final judgment for defendant on December 21, 1955. Plaintiffs filed notice of appeal therefrom on January 11, 1956.

The plaintiffs had until March 12, 1956, to file the record on appeal in this court by reason of the 60 day rule. App. Ct. Rule 1 (2) (d); Sup. Ct. Rule 36. Section (e) of this rule further provides for granting additional time by the reviewing court or a judge thereof during vacation. No authority is conferred upon the trial court or judge thereof to extend the time for filing the record on appeal in any reviewing court. There is a provision granting to the trial judge authority to extend the time for filing a report of proceedings not more than 45 days. If such an extension is granted, the rule further provides (Par. d) that the time for filing the record on appeal is automatically extended 10 days beyond the extended time for filing the report of proceedings.

Appellant's objection to the dismissal of this appeal represented that a trial judge had granted 30 days' extension of time to file the report of proceedings and that a report of proceedings had been filed within the extended period. These representations were the basis for the vacation order denying the motion to dismiss the appeal.

Apparently appellant's counsel misunderstood the provisions of the rule, for this court now finds that the praecipe for record filed by appellant did not call for the inclusion of a report of proceedings, since the case was dismissed on motion attacking the complaint, without hearing on evidence.

We further find that no order has been entered by a trial judge for extension of time to file a report of proceedings, and no such report has ever been filed. The record does disclose an order entered in the circuit court on February 29, 1956, purporting to grant 30 days' extension of time to file the record on appeal in this court. As previously noted, the trial court has no authority to grant such an extension, and the order is void. McDonald v. McDonald, 351 Ill. App. 432.

The record on appeal was filed in this court on April 5, 1956, although the time to file it had expired March 12, 1956. It was filed too late and the appeal must be dismissed. Supreme Court Rule 36 (2) (g) provides: "The reviewing court shall dismiss the appeal if the record on appeal is not filed in proper time." To similar effect is App. Ct. Rule 1 (2) (g).

It is therefore ordered that the order in vacation denying the motion to dismiss this appeal is set aside, as having been entered upon mistake of fact, and this appeal is dismissed.

Appeal Dismissed.

Publish in full.

Filed Nov. 5, 1956,
David F. Mallett,
Clerk of the Appellate Court,
Fourth District of Illinois.

## PETITION FOR LEAVE TO APPEAL.

Albert R. Cosgrove, plaintiff-appellant in this cause in the Appellate Court for the Fourth District, respectfully presents this, his Petition for Leave to Appeal from a final judgment of said Appellate Court to the Supreme Court of Illinois. Your petitioner respectfully submits that a fact essential to a proper presentation of this case requires a correction of the following among the facts stated in the opinion of the Appellate Court.

There was no transcript of testimony filed because there was no testimony taken. The complaint was dismissed by the trial judge on defendant's motion, and that within itself was the proceedings the report of which was filed. The legal proceedings consisted of oral arguments on the motion and extensive briefing in which the motion was reargued by both sides, the trial court had the motion under advisement a long time, and the final proceeding in the trial court was the entry of the order dismissing plaintiff's complaint.

## POINTS AND AUTHORITIES.

1-a.

Ill. Sup. Ct. Rule 36.1 (e) defines what the report of proceedings shall consist of, and the term "report of proceedings" is not synonymous with "the testimony," as report of the proceedings embraces the testimony where there is any, but where there are legal proceedings consisting of rulings of the trial judge and all other matters upon which rulings were made in the absence of testimony, there can still be a report of the proceedings. This same definition is found in the Appellate Court Rule 1 (e), where the same distinction is made.

1-b.

"Report of proceedings," however, is synonymous with "Record on Appeal." Ill. Sup. Ct. Rule 36 "(1) Praecipe for Record: Report of Proceedings at the trial." Same title in App. Ct. Rule 1 (1).

1-c.

The trial judge has the right to grant an extension of time for filing the report of proceedings [Sup. Ct. Rule 36 (2). (c) and App. Ct. Rule 1 (2) (d)], and those courts meant "Record on appeal," otherwise why did they employ the term "further" with regard to "record on appeal" in the next following sentence in each rule.

2-a.

In this case it may no longer be necessary to pass on whether a discharged railroad employee must first

exhaust his administrative remedies (before the Railway Labor Board) under Illinois law before bringing suit for damages for breach of contract for wrongful discharge. Under Federal law such is not the rule, and the decision of Transcontinental & Western Air, Inc., v. Koppal, 345 U. S. 653, 97 L. Ed. 1325, 73 S. Ct. 906, has been completely emasculated by the case of Railway Employees' Department, American Federation of Labor, et al., v. Robert L. Hanson, 76 Sup. Ct. Rep. 714, No. 451; decided May 21st, 1956.

Moore v. Ill. Cent. R. R. Co., 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754;

Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 94 L. Ed. 795, 70 S. Ct. 577.

2-b.

The Illinois Appellate Court for the Fourth District is bound by its own decision in Keel v. Ill. Term. R. Co., 346 Ill. App. 169, 104 N. E. 2d 659.

2-c.

In Illinois it is not required that administrative remedies be exhausted before bringing an action for breach of contract.

Toledo, P. & W. R. R. Co. v. Brown, 375 Ill. 438, 31 N. E. 2d 767;

Buster v. Chicago, M. St. P. & P. R. Co., 195 Fed. 2d 73;

U. S. ex rel. DeLucia v. O'Donovan, 178 Fed. 2d 876, certiorari denied 340 U. S. 886;

Lyons v. Greyhound Lines, 192 Fed. 2d 533.

3.

To deny plaintiff access to our courts is a denial of his State and Federal Constitutional Rights.

U. S. Constitution, 14th Amendment and 10th Amendment;

Illinois Constitution, Art. II, Sections 5, 14 and 19, and Art. III.

Respectfully submitted,

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Attorney for Plaintiff-Petitioner.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. .....

ALBERT R. COSGROVE,
Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Illinois.

## RECORD IN THE SUPREME COURT OF ILLINOIS.


Record Page.

1 Placita and convening order.

2 December 29, 1956. Petition for leave to appeal filed.

4 December 29, 1956. Record of Circuit and Appellate Courts filed.

5 Memorial of filing of transcript of record.

6 March 18, 1957. Order denying petition for leave to appeal.

7 Certificate of the clerk of the Supreme Court of Illinois.